

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JAMES LEATH	:	NO. 93-386-2

MEMORANDUM

Bartle, J.

March 9, 2018

Before the court is the successive motion of defendant James Leath to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 in light of the decision of the United States Supreme Court in Johnson v. United States, 135 S. Ct. 2551 (2015).¹ Leath asserts that his sentence as a career offender was based on an unconstitutionally vague residual clause of the then-mandatory United States Sentencing Guidelines. See U.S.S.G. § 4B1.2(a)(2).

I

On February 25, 1994, Leath was convicted by a jury of one count of conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846. He was sentenced by this court on May 26, 1994 to life imprisonment. At the time of his sentencing, Leath had three prior convictions for crimes of violence as defined in Section 4B1.2 of the Guidelines as in effect at the time: (1) a

1. The Court of Appeals has granted the application of Leath for permission to file this motion pursuant to 28 U.S.C. §§ 2244 and 2255(h).

1985 conviction for simple assault; (2) a 1985 conviction for robbery; and (3) a 1990 conviction for simple assault and reckless endangerment. At the sentencing hearing, this court found that Leath was responsible for the distribution of 84 kilograms of crack cocaine and thus subject to a base offense level of 42. Leath's adjusted offense level was 51 due to application of the following enhancements: (1) a one-level increase because some of the drug transactions occurred within 1,000 feet of a school; (2) a two-level increase for possession of firearms during the conspiracy; (3) a four-level increase as an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; and (4) a two-level increase for obstruction of justice after threatening to kill a witness' mother. With a criminal history category of VI, his Guidelines' sentencing range was life imprisonment. The Court of Appeals affirmed Leath's conviction and sentence. See United States v. Rivers, 54 F.3d 770 (3d Cir. 1995).

On September 12, 1996, Leath filed a motion for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 505 to the Guidelines, which reduced the highest base offense level for drug offenses. The court denied the motion because his Guidelines' range remained life imprisonment.

On March 28, 2005, Leath filed his first habeas petition under 28 U.S.C. § 2255. This court denied the motion

on April 17, 2006 and the Court of Appeals denied his request for a certificate of appealability. On January 7, 2008, Leath filed a petition in the Court of Appeals for leave to file a second or successive petition under § 2255(h). This request was denied.

On February 25, 2008, Leath filed another motion for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706 to the Guidelines, which lowered the base offense levels applicable to most crack cocaine offenses. The court denied the motion because the Amendment did not lower his base offense level and the Court of Appeals affirmed. See United States v. Leath, No. 09-1134 (3d Cir. May 3, 2010). On July 9, 2014, Leath filed in the Court of Appeals a petition seeking leave to file another motion under § 2255. The Court of Appeals denied the petition.

On September 14, 2016, Leath filed with the Court of Appeals an application for leave to file the successive § 2255 motion at issue here. The Court of Appeals stayed Leath's motion pending resolution of In re Hoffner, in which the defendant requested leave to file a successive § 2255 motion challenging a career offender sentence imposed under the mandatory Guidelines based on the Supreme Court's ruling in Johnson. Thereafter, the Court of Appeals in Hoffner held that the defendant had made a "prima facie showing" that he met the

requirements for the filing of a successive habeas petition based on Johnson. 870 F.3d 301, 305 (3d. Cir. 2017). The Court of Appeals did not reach the “ultimate question” of whether Hoffner in fact had raised a meritorious claim under Johnson, but instead left that question to this court to decide in the first instance. Id. at 312. The Court of Appeals thereafter lifted the stay in this action and, as noted above, granted Leath leave to file a successive § 2255 motion to the extent that he sought to raise a claim under Johnson.

II

At the outset, we find that Leath’s motion should be denied because his designation as a career offender did not affect his sentence. As stated above, at the time of sentencing Leath’s base offense level was 42 and his adjusted offense level was 51.² Under the career offender Guideline, Leath’s base offense level would have been 37 and thus his designation as a career offender did not increase his offense level. Although the career offender designation increased his criminal history category from V to VI, Leath faced the same Guidelines’ range of life imprisonment under either category.

2. The highest offense level on the Guidelines sentencing table is 43, which carries a sentencing range of life imprisonment regardless of criminal history category. Thus an offense level above 43 results in a sentence of life imprisonment. See U.S.S.G. § 5A, comment, n.2.

Despite amendments to the base offense levels for crack cocaine offenses, Leath's base offense level remains 38 due to the large quantity of drugs for which he was found responsible and his Guidelines' range continues to be life imprisonment. Thus, resentencing without a career offender designation would not result in a lower range. Because any alleged error in applying the career offender enhancement does not affect Leath's sentence, habeas relief is not warranted.

III

Even assuming that designation as a career offender had an impact on his sentence, Leath's motion fails. Section 2255(h) "greatly restricts the power of federal courts to award relief" on the basis of second or successive motions. Tyler v. Cain, 533 U.S. 656, 661 (2001). It provides that a second or successive application must contain:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). The second clause is the provision on which Leath relies. Thus, Leath must demonstrate that his motion: (1) relies on a new rule of constitutional law;

(2) made retroactive by the Supreme Court to cases on collateral review; and (3) that the claim was previously unavailable. Id.

As stated above, Leath relies on Johnson v. United States. In Johnson, the Supreme Court held that what is known as the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924, was void for vagueness. 135 S. Ct. at 2563. This clause stated that a prior conviction was a violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. § 924(e)(2)(B)(ii). Later in Welch v. United States, the Supreme Court held that Johnson applies retroactively to petitioners who were sentenced under ACCA before Johnson had been decided. 136 S. Ct. 1257, 1265 (2016).

Leath asserts that Johnson likewise invalidates the similar residual clause of the "crime of violence" definition in the career offender provision of the then-mandatory Sentencing Guidelines, U.S.S.G. § 4B1.2.³ We previously rejected this very argument in United States v. Hoffner, No. 00-456-2, 2018 WL 617796 (E.D. Pa. Jan. 30, 2018). There, we denied the defendant's successive § 2255 motion because the Supreme Court

3. Leath suggests that this court may have mistakenly sentenced him as an armed career criminal under the ACCA, 18 U.S.C. § 924(e), instead of a career offender under the Guidelines. The record, however, does not support this contention. Leath was not charged with a firearms offense in violation of § 922(g), and thus could not be deemed an armed career criminal.

has not declared any new rule providing that the residual clause in the "crime of violence" provision in the then-mandatory career offender Guideline was unconstitutionally vague. Id. at *2-4; see also 28 U.S.C. § 2255(h) (2).

Accordingly, for the reasons fully stated in Hoffner, the motion of Leath to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 based on Johnson will be denied.

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ORDER

AND NOW, this 9th day of March, 2018, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 is DENIED; and

(2) no certificate of appealability is issued.

BY THE COURT:

/s/ Harvey Bartle III

J.